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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RALPH L. READ, M.D.,

Petitioner,

v.

MEDICAL X-RAY CENTER, P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A jury found that a dominant health care practice willfully maintained its monopoly by a number of exclusionary practices at five different market entry points. The court of appeals' reversal of that verdict focused on the monopolist's conduct at the only point of market entry which was not subject to an exclusive dealing arrangement, thereby raising the following questions:

Whether a monopolist, as a matter of law, may charge a rival a fee for not discriminating against the rival's customers on the grounds that the rival is "free riding" on the larger capacity of the monopolist.

Is a monopolist's conduct—which forecloses rivals—excused from condemnation as unlawful monopolization because the challenged conduct is a "customary practice" in the monopolized market?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

I. The Eighth Circuit's Opinion Ignores *Lorain Journal, Aspen, Sylvania* And *Continental Ore* And The Analytical Framework Adopted By Other Circuits For Applying These Decisions 10

A. The Outcome Of This Case Turns On Whether MXC's Conduct Was Anticompetitive 10

B. The Eighth Circuit's Analysis Would Eviscerate This Court's Holdings In *Lorain Journal* And *Aspen* 10

C. The Eighth Circuit Misconstrued And Misapplied The Free Rider Concept 12

1. There is no free rider problem here 13

2. The Eighth Circuit's application of a *per se* rule of *non*-liability conflicts with the analysis of several Circuits 14

3. MXC's demand for a "penalty payment" was anticompetitive 16

D. The Eighth Circuit's Holding That A Contract—Which Forecloses Rivals—Can Be Excused As A "Customary Practice" Creates A Conflict In The Circuits 19

E. The Court Of Appeals' Analysis Also Undermines *Continental Ore* 20

II. The Monopolization Strategy Approved By The Court Of Appeals Has Broad Application 22

A. The Antitrust Issues Involved In This Case Need Clarification And Reinforcement 22

B. The Case Has Special Significance In Light Of The National Interest In Competitive Health Care Markets 23

CONCLUSION 25

APPENDIX . . . . . *infra*

TABLE OF AUTHORITIES

Cases: PAGE

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847 (1985) 9, 11, 12, 20

Associate Radio Service Co. v. Page Airways, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) 21

Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358 (3d Cir. 1992) 15

Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727 (9th Cir. 1979) 21

Chicago Professional Sports L.P. v. National Basketball Ass'n, 961 F.2d 667 (7th Cir. 1992) ... 18

City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981) 21

City of Mishawaka v. American Electric Power Co., 616 F.2d 976 (7th Cir. 1981) 21

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404 (1962) ... 20, 21

Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 95 S. Ct. 2549 (1977) 9, 13, 14

Eastman Kodak v. Image Technical Services, 504 U.S. 451, 112 S. Ct. 2072 (1992) 11, 18

Eiberger v. Sony Corporation of America, 622 F.2d 1068 (2d Cir. 1980) 15

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977) 19

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551 (1984) 9

Lorain Journal v. United States,
342 U.S. 143, 72 S. Ct. 181 (1951) 9, 11, 22

Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,
585 F.2d 821 (7th Cir. 1978) 14, 15

Statutes:

15 U.S.C., Sec. 2 1

15 U.S.C., Sec. 15 2

Other Authorities:

Ahern, *Refusals to Deal After Aspen*,
Antitrust Law Journal, Fall 1994 13

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(1997 Supp.) 10, 15

Calkins, S., *Supreme Court Antitrust 1991-92*,
Antitrust Law Journal, Winter 1993 16

Jorde and Teece, *The Boundaries of Horizontal Restraints: Communication And Cooperation Among Competitors*, Antitrust Law Journal,
Winter 1993 16

Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 Yale L.J. 209 (1986) 22

U.S. Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in the Health Care Area (August 1996) 23

Comments of Kevin O'Connor, Chair, National Association of Attorney Generals Multi-state Antitrust Task Force, Antitrust Law Journal, Spring 1996 24

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Ralph L. Read, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 110 F.3d 543. The opinion of the district court (App., *infra*, 11a-30a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 2, 1997 (App., *infra*, 1a). A timely filed petition for rehearing was denied on May 9, 1997 (App., *infra*, 10a). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act (15 U.S.C. Sec. 2) provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Act (15 U.S.C. Sec. 15) provides, in pertinent part, that:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

Introduction

While the factual summary which follows provides additional details, the jury, the district court and the Eighth Circuit all agreed as to these basic facts:

- Respondent Medical X-Ray Center ("MXC") has monopoly power in the market for radiology services in and about Sioux Falls, South Dakota (App., *infra,* 15a);
- in response to Petitioner Dr. Read's entry into the market as a rival radiologist, MXC obtained exclusive deals to provide radiology services at all but one hospital in the market (App., *infra,* 7, 15, 18, 28a);
- at the one hospital not completely foreclosed by an exclusive deal, consumers (in the form of referring physicians and the Medical Staff Executive Committee) requested the ability to designate, in advance, Dr. Read as their first choice and MXC as their second choice of radiologist (Exh. 142);

- MXC declined to accept unconditionally referrals from Dr. Read's customers. MXC was willing to accept referrals from Dr. Read's customers only "*if* Dr. Read signed a 'coverage contract' . . ." (App., *infra*, 4a). The proposed contract required that Dr. Read pay MXC an unspecified sum as a condition to MXC accepting referrals from Dr. Read's customers. (App., *infra*, 4a); and
- Dr. Read refused to pay MXC the demanded payment (App., *infra*, 6a).

The jury found MXC's conduct was anticompetitive, and the district court affirmed. The court of appeals' reversal of the jury's verdict effectively permits a monopolist to charge a rival a fee as a condition for not discriminating against the rival's customers, under the pretense that the rival is "free riding" on the capacity of the monopolist.

The Market

There are five hospitals within a twenty-five mile radius of Sioux Falls, South Dakota. McKennan Hospital ("McKennan") and Sioux Valley Hospital ("SVH") are 400-plus bed tertiary care centers; there are no comparable hospitals within 80 miles of Sioux Falls. Tr. 683; 694. Sioux Falls also has a sizable Veteran's Administration ("VA") hospital. Tr. 517. Two small hospitals lie 20 miles outside the Sioux Falls city limit: Canton-Inwood Hospital and Dell Rapids Community Hospital.

MXC's Monopoly Power

For at least 25 years, Respondent MXC has been the exclusive provider of radiology services in this market. It

employs all 24 radiologists privileged at the five hospitals referred to above. Tr. 120; 131-132. MXC's expert economist testified that with the exception of when Dr. Read was practicing independently, none of the three traditional forms of competition in radiology services—competition for exclusive contracts, competition for employment by hospitals or case-by-case competition for referrals in an open staff—was present in the market. Tr. 2912-13.

Within the relevant geographic market, MXC had an undisputed 90% share of inpatient radiology services. Tr. 420; 922; 931.[1] MXC's prices, on average, were 20% higher than those charged on average in South Dakota and 15% higher than prices in competitive markets in the seven-state region surrounding South Dakota. Tr. 542-44.

The rulings of both the district court and the court of appeals left intact the jury's finding that MXC had monopoly power.

The Restrictive Covenants

Since 1987, each MXC physician has been contractually restricted from practicing within 25 miles of the Sioux Falls city limits for a period of 2 years after leaving MXC. Tr. 140; 2378; 2299; Exh. 210. MXC also resorted to a market division scheme to foreclose entry by potential competitors. Exh. 64. Each of these activities inhibited the formation of a rival for MXC and curtailed the supply of other potential associates/employees for Dr. Read.

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[1] The other 10% of radiology services was performed by orthopedic surgeons, cardiologists and OB/GYNs performing a limited range of diagnostic procedures on their own patients. Tr. 293, 422, 436, 1189.

Dr. Read

Dr. Read joined MXC in 1975. Tr. 1319. By 1987, Dr. Read sought to create a different practice style, one that emphasized quality of care rather than high incomes. Tr. 1450. Every other radiologist who had left MXC simply left town. But Dr. Read decided to resign from MXC, ride out his restrictive covenant and then compete with MXC. To avoid forced idleness during the restrictive covenant period, Dr. Read contracted with MXC to be an independent contractor. Tr. 1462; 1550. Between mid-1988 and mid-1990, he worked days and nights at all Sioux Falls hospitals under this arrangement. Tr. 1399; 1468.

The Exclusive Dealing Arrangements

In March 1990, Dr. Read announced his intent to compete with MXC once his restrictive covenant expired, and to undercut MXC's prices. In response to Dr. Read's decision, MXC shored up its defenses to entry. In a deal with the Central Plains Clinic ("CPC"), MXC agreed to increase CPC's share of revenue generated from outpatient radiology work performed by MXC at the clinic in return for CPC's promise that its physicians would refer to MXC all the inpatient radiology work required by their patients at area hospitals. Exh. 112, 136, 138, 166; Tr. 825, 829-31. This arrangement was enjoined by the district court. MXC also obtained exclusive dealing arrangements at the VA Hospital and McKennan and enforced an exclusive contract at Canton-Inwood. Exh. 36, Exh. 79; Tr. 313, 322, 328, 392, 1111, and 1413-14.

Collectively, these exclusive arrangements foreclosed 70% of the market to MXC's competitors, leaving one viable practice option for Dr. Read—the case-by-case competition for referrals in SVH's open staff.

Sioux Valley Hospital ("SVH")

SVH had an open staff in radiology, meaning that any privileged radiologist could compete for referrals from SVH's Medical Staff. MXC did not have any contractual arrangement with SVH; and Dr. Read held privileges there equal to those held by MXC's radiologists. Tr. 1206, 1405.

After his restrictive covenant expired, Dr. Read sought to exercise his privileges at SVH. Tr. 1541, 1560. SVH's medical staff decided that referring physicians not bound to MXC by the CPC/MXC contract should be permitted to select either MXC or Dr. Read on "choice cards". Dr. Read sought to give individual referring physicians the option to designate Dr. Read as their first choice and MXC as a second choice, when Dr. Read was not available. Tr. 1209-10; Tr. 1568-69; Exh. 108. MXC would be able to bill the patient for this referral work at its own prices. Tr. 1601. MXC vetoed Dr. Read's suggestion. Tr. 1329. The SVH Medical Staff Executive Committee—a group comprised of physician department heads—endorsed Dr. Read's suggestion. Tr. 1212; Exh. 142. MXC again vetoed it. Tr. 1315, 1330.[2]

MXC's unwillingness to service Dr. Read's customers had the desired effect. One of Dr. Read's customers, Dr. Friess, testified that because he feared MXC would not accept his referrals when Dr. Read was not available, he was forced to discontinue using Dr. Read. Friess Tr., p. 10.

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[2] Dr. Read also repeatedly stated that he was willing to take his proportional share of SVH-mandated night and weekend call. Exh. 122. Dr. Read also was willing to accept cases from MXC's customers when MXC was not available. Tr. 1766.

MXC's Demand for "Monopoly Rent"

After rejecting the wishes of the SVH Medical Staff, MXC offered Dr. Read a take-it-or-leave-it "coverage contract." The contract required Dr. Read to pay MXC an *unspecified* sum of money, in return for MXC's agreement to accept referrals from Dr. Read's customers. Exh. 944. Dr. Read rejected this demand.

The Jury Verdict

After a three week trial, the jury deliberated for two days before finding that MXC had violated Sections 1 and 2 of the Sherman Act. Dr. Read was awarded $608,000 (before trebling).

The District Court's Opinion

The district court denied MXC's motion for judgment as a matter of law as to the jury's Section 2 verdict, but granted the motion with respect to the Section 1 verdict. Regarding the Section 2 claim, the district court deferred to the jury's finding that MXC's conduct was anticompetitive and caused Dr. Read injury. It concluded that MXC's market division scheme was "the most explicit evidence of defendant trying to keep others out of their business." App., 15a. The district court also entered an injunction prohibiting the enforcement of MXC's restrictive covenants and its exclusive referral deal for hospitalized patients with the CPC, conditioned upon Dr. Read returning to Sioux Falls to practice. App., 28a.

With respect to the Section 1 claim, the court found: 1) that area hospitals had not conspired with MXC; and

2) that exclusive contracts are not "necessarily violative of Section 1." App., 18a.

The Eighth Circuit's Opinion

The Eighth Circuit's opinion focused on MXC's conduct at SVH. The court held that, "Dr. Read's lack of coverage cost him business" but that MXC "proposed a reasonable written contract that would have solved Dr. Read's coverage problem . . ." App., 6a. It also found that "Dr. Read's injury was caused by legitimate competition" because "Dr. Read wanted to 'free ride' . . . by forcing MXC to provide [24 hour coverage] to him for free." *Id.* The court concluded that, "MXC's insistence on a coverage contract from a price-chopping competitor was not unreasonable or anticompetitive." App., 8a.

The court also found that MXC's restrictive covenants, which precluded other MXC physicians from associating with Dr. Read, did not cause Dr. Read's injury because, it said, "Dr. Read presented no evidence that any individual MXC doctor wanted to cover Dr. Read but could not but for MXC's restrictive covenants." App., 6a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's opinion ignores this Court's precedents and eschews the analytical framework applied by other Circuits by concluding that a monopolist may charge a rival a fee as a condition for not discriminating against the rival's customers. The result demonstrates the need for further guidance from this Court with respect to the proper framework in which to differentiate unlawful anticompetitive behavior from justifiable efforts to prevent "free riding."

A monopolists' discrimination against its rivals' customers was unanimously condemned by this Court in *Lorain Journal v. United States*, 342 U.S. 143, 72 S. Ct. 181 (1951) and again in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S. Ct. 2847 (1984). In *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 97 S. Ct. 2549 (1977), the Court held that vertical restraints designed to prevent a "free ride" on unrecoverable capital investment could be justified as procompetitive and lawful. But the Court has never had the opportunity, on a fully developed record, to address the extent to which the "free rider" rationale may be employed to justify otherwise anti-competitive conduct, particularly where those violations involve horizontal restraints imposed by a monopolist. Although many courts of appeals (other than the Eighth Circuit) have properly required examination of the actual purpose and impact of restraints directed to alleged free riders, the court of appeals' opinion in this case accepts the free rider justification *as a matter of law*, without inquiring into the restraint's impact on consumers or its justification. Unreviewed, the decision invites monopolists to misuse the insights recognized by *Sylvania* in order to lessen competition and harm consumers, without reference to whether there are normal pro-competitive benefits arising from the restraint.

This case also has significant implications for the antitrust doctrine of foreclosure through exclusive dealing, a practice which recurs in the health care industry. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551 (1984). Although exclusive dealing arrangements between certain medical specialty practice groups and hospitals may generate efficiencies, antitrust doctrine precludes these arrangements where the effect is to foreclose meaningful competition. At SVH, MXC achieved the

same level of exclusion as it would have with an exclusive contract, but without the pro-consumer benefits, by imposing a discriminatory fee on Dr. Read.

I.

THE EIGHTH CIRCUIT'S OPINION IGNORES *LORAIN JOURNAL, ASPEN, SYLVANIA* AND *CONTINENTAL ORE* AND THE ANALYTICAL FRAMEWORK ADOPTED BY OTHER CIRCUITS FOR APPLYING THESE DECISIONS

A. The Outcome Of This Case Turns On Whether MXC's Conduct Was Anticompetitive

Although the Eighth Circuit characterized its opinion as a causation analysis, the opinion rests on the court's view that MXC's demand for a "penalty payment" from Dr. Read was not anticompetitive. The court of appeals acknowledged that Dr. Read's "lack of coverage cost him business at SVH and McKennan." App. 6a. But it found that the "coverage contract"—which, according to the court, would have "solved Dr. Read's coverage problem"—was "not unreasonable or anticompetitive." App. 8a. It concluded that "we believe Dr. Read's injury was caused by legitimate competition rather than anticompetitive conduct." App. 8a. It follows that if MXC's insistence on a payment from Dr. Read *were* anticompetitive, Dr. Read has established causation. *See*, Areeda and Hovenkamp, *Antitrust Law*, Par. 362, n. 1 (1997 Supp.) ("Courts continue to find lack of antitrust injury when what they clearly mean is lack of any recognizable antitrust violation.")

B. The Eighth Circuit's Analysis Would Eviscerate This Court's Holdings In *Lorain Journal* And *Aspen*

Almost 50 years ago, the Court held in *Lorain Journal* that Section 2 prohibits a firm from exercising monopoly

power by refusing to deal with customers solely because of their decision to continue to patronize a rival. In its recent unanimous decision in *Aspen,* the Court frequently cited this principle with approval.[3] The court of appeals failed to even cite these decisions, despite their direct applicability here.

Lorain Journal involved the discrimination by a monopolist newspaper towards advertisers who also advertised with a new rival, a local radio station. Similarly, in this case MXC demanded the payment of a "penalty fee" in return for not discriminating against Dr. Read's customers. The ability to impose a penalty on the radio station's customers occurred in *Lorain Journal* because advertisers who wanted to reach a full audience needed to continue to do some business with the Lorain Journal. Similarly, physicians who preferred Dr. Read's less expensive services still needed to do business with MXC when Dr. Read was unavailable.[4] In neither case, of course, is there a "free rider" problem; advertisers in *Lorain Journal* would have been willing to pay the usual rate for newspaper ads, just as SVH's referring physicians, on behalf of patients, were willing to pay MXC's usual fees. Under the Eighth Circuit's reasoning, however, the Lorain Journal could have lawfully insisted that the rival radio station pay a special fee as a

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[3] Likewise, in *Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 483, 112 S. Ct. 2072, 2091, n.32 (1992), this Court observed that a monopolist can refuse to deal with its competitors "only if there are legitimate reasons for the refusal."

[4] The court of appeals' suggestion that "hospitals and primary care doctors desired 24-hour service for their patients," (App., 6a) should not be mistaken for a consumer preference for how the service was to be delivered. Indeed, what consumers preferred here was the ability to choose Dr. Read as their first choice, and MXC as their second.

condition for the Journal's continued acceptance of advertisements from patrons of both outlets.

In *Aspen*, the Court sustained a finding of monopolization where the defendant ceased a profitable joint venture with the plaintiff to provide a product desired by consumers. The defendant there was "willing to sacrifice short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival." 472 U.S. at 610-611; 105 S. Ct. at 2861. MXC made the same sacrifice here, foregoing the chance to impress Dr. Read's customers and earn fees for the longer-term benefit (to MXC) of those customers having no choice but to use MXC.

Strikingly, the defendant in *Aspen*, like MXC here, offered to continue the joint venture provided that the *Aspen* plaintiff accept a sharp reduction in its share of the venture's revenue. The Eighth Circuit's reasoning that Dr. Read should have accepted MXC's demand for a payment would suggest that in *Aspen*, the plaintiff's failure to accept the defendant's coercive offer precluded a finding that the misconduct caused antitrust injury. Of course, this is precisely opposite to the holding in *Aspen*.

C. The Eighth Circuit Misconstrued And Misapplied The Free Rider Concept

Because neither Dr. Read nor his customers sought to misappropriate any investment made by MXC, there is no free rider problem in the first instance. But even assuming MXC would incur marginal costs to accept cases from Dr. Read's customers, the Eighth Circuit's declination to analyze whether those costs were in line with the costs sought to be imposed on Dr. Read is at odds with how the free rider issue has been analyzed in the other Circuits. A disciplined analysis is particularly important where, as here,

the challenged restraint was imposed by a monopolist on a horizontal competitor (as opposed to a vertical restraint imposed by a manufacturer on a dealer).[5]

1. There is no free rider problem here

The "free rider problem" was articulated by this Court in *Continental T.V., Inc. v. GTE Sylvania Incorporated*, 433 U.S. 36, 97 S. Ct. 2549 (1977) ("*Sylvania*"). At issue in *Sylvania* was whether a manufacturer's territorial restriction on its distributor should be *per se* illegal or whether it should be subjected to Rule of Reason analysis. In concluding that the Rule of Reason should be applied, the Court observed that "economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers" and that such restraints may be used "in order to induce competent and aggressive capital and labor that is often required in the distribution of products unknown to the consumer." 433 U.S. at 54-55, 97 S. Ct. at 2560.

In this case, the court of appeals did not identify any unrecovered investment MXC made to accept cases from Dr. Read's customers because there was none. Dr. Read did not ask MXC to staff SVH's radiology department at times MXC would not have otherwise provided radiology services. He did not ask MXC to alter whatever patient schedule was in place to accommodate a referral from a physician who otherwise dealt with Dr. Read. Nor did Dr. Read ask MXC

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[5] Indeed, some commentators have questioned whether the "free-riding" concept is even applicable in this context. *See*, Ahern, *Refusals to Deal After Aspen*, Antitrust Law Journal, Fall 1994 ("[T]o sanction a refusal to deal based on this type of "free-rider" argument would eviscerate liability in refusal to deal cases—and essential facilities cases as well.")

to provide such patients any services over and above the services MXC normally provided. To say that MXC was accommodating Dr. Read is to say that Home Depot accommodates a neighborhood hardware store by being open on Sunday.

All Dr. Read asked of MXC was that asked by WEOL of the Lorain Journal—that when a referring physician came knocking on MXC's door, that MXC either accept or reject the case using their usual economic criteria, and not the criteria of whether the referring physician had selected Dr. Read as their first choice of radiologist.[6]

2. The Eighth Circuit's application of a *per se* rule of *non*-liability conflicts with the analysis of several Circuits

Once the court of appeals concluded that Dr. Read was free riding, it ended its inquiry and concluded that the restraint MXC sought to impose on Dr. Read was reasonable. But a rule of *per se non*-liability is fundamentally at odds with *Sylvania* and the analytical approach applied by other Circuits.

A correct analysis is illustrated by the Seventh Circuit's decision in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Incorporated*, 585 F.2d 821 (7th Cir. 1978). In that case, a licensor

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[6] The court of appeals' endorsement of MXC's conduct is particularly damaging here considering the economic realities faced by new entrants to this market. At SVH and McKennan, it would take a group of six or seven radiologists to replace MXC—an unlikely option for consumers considering Sioux Falls' geographic remoteness. Replacement of MXC at SVH and McKennan was also inhibited by the MXC/CPC contract, which guaranteed to MXC the referrals of CPC physicians on those hospitals' medical staffs. Tr. 391. Hence, if MXC can foreclose small scale entry (like Dr. Read) it can insulate its monopoly forever.

attempted to impose "pass over payments" on its licensee, ostensibly to cover promotional and advertising expenses. The court found that the payments had a "plausible theoretical justification." 585 F.2d at 829. But the court held that mere plausibility does not amount to actual justification:

> Even if there were some "free rider" effect from such advertising, the jury could easily have found that compensating an "invaded" licensee to the full proportionate extent of all of his advertising and promotion expenses went much further than needed for the limited articulated purpose. *Id.*

The Third Circuit applied a similar analysis in *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992). In that case, a prospective dealer was turned down for a BMW dealership. The manufacturer claimed that the prospective dealer threatened to be a "free rider." 974 F.2d at 1375. But the court found this defense to be pretextual, noting that the prospective dealer "asserts that he had been willing to conform to any service and facilities requirements that [the manufacturer] demanded." *Id. See, also, Eiberger v. Sony Corporation of America*, 622 F.2d 1068 (2d Cir. 1980). ("That a practice is not *per se* unlawful does not mean that it is *per se* lawful.")[7]

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[7] The proper analytical framework was also suggested by Professors Areeda and Hovenkamp in their discussion of the essential facility doctrine. They write:

> As with most non-*per se* claims, the plaintiff bears the burden of persuasion that the challenged conduct is unreasonable. Of course, the defendant should bear the usual burden of coming forward with some evidence of justification. But once it does, it should be the plaintiff's obligation to persuade the judge or jury that the justification should be rejected. Areeda and Hovenkamp, *Antitrust Law*, par. 773.

Commentators, including the present General Counsel of the Federal Trade Commission, have repeatedly noted the need for guidance from this Court on the proper analytical framework in the refusal to deal context. *See, e.g.*, Calkins, S., *Supreme Court Antitrust 1991-92,* Antitrust Law Journal, Winter 1993 ("The [*Kodak*] Court was maddeningly silent, moreover, on burdens of proof."); Jorde and Teece, *The Boundaries of Horizontal Restraints: Communication and Cooperation Among Competitors,* Antitrust Law Journal, Winter 1993 (suggesting that once plaintiff proves anticompetitive conduct defendant may attempt to justify that conduct and plaintiff may rebut by showing the justifications are pretextual). As demonstrated below, had the court of appeals applied the type of disciplined analysis adopted by other Circuits, it would have found the jury had ample evidence to conclude that MXC's conduct was anticompetitive, and caused Dr. Read injury.

3. MXC's demand for a "penalty payment" was anticompetitive

The "coverage contract" demanded by MXC of Dr. Read did not contain a price term. The court of appeal's conclusion that it was "reasonable" thus suggests that, as a matter of law, MXC could impose *any* cost it wished on Dr. Read. But there was more than sufficient evidence for the jury to have concluded that even a demand for one dollar would have been anticompetitive.

First, the fact that MXC did not incur any costs to accept cases from Dr. Read's customers was established by the fact that MXC did not seek similar payments from other physicians who, like orthopedic surgeons, often read their own films and sought to use MXC only on occasion. MXC's Dr. Wierda's explanation of the difference in treatment revealed

that the demand for a payment from Dr. Read was a naked restraint:

> Q. You testified previously [Dr. Hovensten] is a competitor of yours also, right?
>
> A. Dr. Hovensten is an orthopedist. Dr. Hovensten has an x-ray room in his office. He takes and interprets radiographs. And in that form, yes, is a competitor.
>
> Q. Okay. And on occasion, however, MXC will interpret films for Dr. Hovensten, will they not?
>
> A. On an outpatient basis, I can't recall him referring cases to us. On a hospital basis, we may have to do a CT scan on a patient of his, an operative film, yes, that is true.
>
> Q. Do you charge that competitor a fee for the right to refer a case to you?
>
> A. No.
>
> Q. Not even a dollar, right?
>
> A. No. But you, again, are comparing—
>
> Q. So what is it you want to tell me between the difference with Dr. Hovensten and some other situation?
>
> A. Well, Dr. Read's situation is entirely different than Dr. Hovensten. Dr. Read is a competitor. He's a radiologist. So the situation is not comparable. Tr. 1348-49.

In other words, the defendants' own testimony was not that Dr. Read was charged to avoid free riding; he was charged because he was a direct competitor.

Second, the jury's conclusion that MXC's demand for a penalty fee was unjustified was also supported by testimony that in competitive markets, such a fee was unheard of. As put by Tom Bradshaw, a hospital administrator called as an expert witness by Dr. Read:

Q. Have you ever seen a contractual arrangement where one radiology group required another radiologist to pay both a fee for the service and turn over the entirety of the bill from the patient?

A. No. I've never seen that. Tr. 1895.

Third, MXC could not even justify a special fee from Dr. Read for MXC's handling of his customers' referrals "after hours." MXC's standard billing structure included an "after hours" fee that it was free to charge late night patients. Exh. 289. Assuming MXC did have costs unrecoverable through its standard fee, MXC's ability to recover this cost from the patient eliminates any free rider problem. *See, Chicago Professional Sports L.P. v. National Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) (Easterbrook, J.) ("What gives this name free riding is the lack of charge . . . when payment is possible, *free* riding is not a problem because the 'ride' is not free.")[8]

And *fourth*, even assuming *arguendo,* that if MXC was incurring a cost in serving Dr. Read's customers, Dr. Read, like the prospective dealer in the *Big Apple BMW* case, was more than willing to pay for it by serving MXC customers at times when MXC physicians were not available. Tr. 1766.[9]

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[8] The anticompetitive nature of MXC's conduct is demonstrated by the fact that MXC wanted to collect this "after-hours" fee from its patient *and* another "penalty fee" from Dr. Read.

[9] It should also be noted that Dr. Read, like the respondents in *Eastman Kodak v. Image Technical Services*, 504 U.S. at 485, had invested substantially in this market. Prior to leaving MXC, he had spent 15 years working at Sioux Falls hospitals and serving referring physicians there.

D. The Eighth Circuit's Holding That A Contract—Which Forecloses Rivals—Can Be Excused As A "Customary Practice" Creates A Conflict In The Circuits

The Eighth Circuit also committed legal error by referencing the community practice of "paying MXC compensation" and then approving the practice as the "medical community's normal coverage practices". (App., 6a.). In other words, the Eighth Circuit uses the term "medical community" to describe the community in which MXC, an admitted monopolist, is the only member.

The court of appeals thus reduced the antitrust laws to protecting the business practices prevalent in a market, even if that market is dominated by a monopolist. This approach disregards the important role the antitrust laws play in determining what is and is not acceptable business behavior. It also creates a split in the Circuits on this important standard of conduct issue. *See, Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 998 (D.C. Cir. 1977) ("It is settled, moreover, that evidence of customs and practices in an industry is irrelevant in determining whether the defendant has violated the antitrust laws").

The Eighth Circuit's decision undermines the ability of the antitrust laws to condemn conduct which injures consumer welfare. For example, the Eighth Circuit did not find that consumers are better off under the "medical community's normal coverage practices," nor did it find that those coverage practices enhanced competition rather than destroyed it. Thus, the Eighth Circuit's reliance upon the "medical community's normal coverage practices" is legally erroneous and is a dangerous precedent for the future. If MXC's imposing a non-cost-based fee on a competitor in order to accept referrals from the competitor's customers is an appropriate business practice, then, as health care

markets continue to consolidate, that conduct may become a practice norm.

E. The Court of Appeals' Analysis Also Undermines *Continental Ore*

The court of appeals erroneously concluded that the "coverage contract" was "reasonable," and that Dr. Read's losses were "self-inflicted." In doing so, the Eighth Circuit broke with this Court's precedent and opinions of other Circuits in not considering the effect of MXC's exclusionary practices as a whole.[10]

The jury's focus on the entirety of MXC's conduct is precisely the approach mandated by *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S. Ct. 1404 (1962). In *Continental Ore*, which was a causation case, the defendants were charged with acquiring control over certain ore deposits and with refusing to sell the ore to their competitors. According to this Court, the court of appeals "examined seriatim" the various anticompetitive ventures and "ruled separately upon the respondents' alleged damage to [plaintiff] in connection with each of these episodes." 370 U.S. at 698, 82 S. Ct. 1410. But this

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[10] Significantly, the jury did not have to find that the "coverage contract" itself was illegal in order to find in favor of Dr. Read. The jury was instructed that MXC's refusal "to cover [Dr. Read's] diagnostic radiology practice" was lawful. Instruction 19C. But that did not end the inquiry. Like the *Aspen* jury, the jury here was also instructed that it could consider whether MXC declined to "cover" Dr. Read for legitimate business reasons, or, whether it engaged in that conduct to further its dominance in the market. Having found in favor of Dr. Read, "[the Court] must assume that the jury concluded that there were no valid business reasons" for the restraint, in light of the entirety of MXC's conduct. *Aspen,* 472 U.S. at 604-5, 105 S.Ct. at 2858-9.

Court rejected that type of narrow compartmentalizing, holding that "[i]n cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 699, 82 S. Ct. at 1410. The *Continental Ore* approach has been almost uniformly followed by other Circuits.[11]

The effect of the court of appeals' overly narrow focus is illustrated by its finding that the coverage contract was "reasonable." This conclusion is reached without mention of the MXC/CPC contract (which was enjoined by the district court as a market restraint)[12] or the *per se* wrongful market division scheme (which the district court found to be the most egregious of MXC's anticompetitive acts). The same approach is seen in the court's finding that, "Read's lack of coverage cannot be blamed on MXC." App., 6. This conclusion, which is based on Dr. Read's refusal to accept the "coverage contract," ignores *inter alia* the use of restrictive covenants in the MXC's employment contracts and MXC's market division scheme that inhibited the formation of rivals who could have associated with Dr. Read. Thus, MXC prevented Dr. Read from creating a firm which could satisfy all of its customers' needs at all times, and then used Dr.

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[11] *See, City of Mishawaka v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1981); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Associate Radio Service Co. v. Page Airways*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). *But, see, Cal. Computer Products v. Intern. Business Machines*, 613 F.2d 727 (9th Cir. 1979) ("There can be no synergistic result such as [plaintiff] claims from a number of acts none of which show casual antitrust injury to [plaintiff]").

[12] Ironically, and without discussion, the court of appeals concludes that Dr. Read should have also sought an arrangement like the MXC/CPC arrangement.

Read's inability to create such a firm to brand him a "free rider."

II.

THE MONOPOLIZATION STRATEGY APPROVED BY THE COURT OF APPEALS HAS BROAD APPLICATION

A. The Antitrust Issues Involved In This Case Need Clarification And Reinforcement

The holding in this case undermines long-standing economic insights, bolstered by recent economic analysis, concerning the ability of monopolists to maintain power by raising rivals' costs.[13] The Eighth Circuit conceded that the purpose of MXC's contract was to raise Dr. Read's costs, but the court *praised* this goal as designed to prevent "price-chopping" by a supposedly free riding Dr. Read. The court's decision paves the way for exclusionary conduct. Any service provider with market power trying to disadvantage its rival by raising the rivals' costs will now cite the Eighth Circuit's opinion to claim that its conduct was simply designed to prevent free riding.

A monopolist might try to maintain its monopoly power by raising barriers to entry and disadvantaging new entrants. The monopolist can carry out this strategy in a number of ways in the common situation where the customers need to continue to do some business with the monopolist. *See*, *Lorain Journal*. One way is to reduce the available pool of customers for the entrant. This can be done by forcing consumers to make an all-or-nothing choice between the monopolist and the entrant—e.g., MXC's contract requiring CPC physicians to use MXC for SVH referrals.

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[13] Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 Yale L.J. 209 (1986).

Another way is to impose costs on the rival's potential customers by charging them a higher penalty price if they purchase any services from the entrant. In such a case, the entrant will need to compensate the customers for these higher costs, in essence paying the penalty to the monopolist itself. This places the entrant at an effective cost disadvantage in the market that may doom its entry. MXC used this technique too, when it sought to impose a penalty payment on Dr. Read.

The court of appeals' endorsement of MXC's strategy turns the antitrust laws on their head. These laws are not hostile to would-be "price-chopping" competitors in monopolized markets. MXC is a monopolist charging a monopoly price. Dr. Read was attempting to improve consumer welfare by competing with MXC. Unless the Eighth Circuit's decision is reversed, consumers everywhere will be the victims.

B. The Case Has Special Significance In Light Of The National Interest In Competitive Health Care Markets

The Government has promulgated health care policy statements that implicitly recognize that competition in health care markets is a national priority. *U.S. Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in the Health Care Area* (August 1996) The problem faced by Dr. Read is often encountered in health care markets where competing physicians work side-by-side in the delivery of medical care, and where consolidation of physician groups is increasing.[14]

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[14] Refusals to deal have been a persistent problem in health care markets. The FTC has a long history of enforcement directed

(continued...)

Much of this consolidation is beneficial, as it eliminates excess capacity. But all observers of the health care marketplace will understand the *carte blanche* nature of the Eighth Circuit's opinion. They will all know and immediately recognize that Dr. Read was being told he had to pay a penalty to a monopolist or face discrimination, and that this sort of practice is unheard of in ordinary medical practices. That such blatantly exclusionary activity was deemed valid as a matter of law, and despite monopoly power and a properly instructed jury's finding of exclusionary behavior, will be seen as a green light for anticompetitive behavior in these markets.

Finally, this case presents this Court with an opportunity to reaffirm that the antitrust laws apply to the health care industry, which comprises one-seventh of the American economy. In no other industry has public and private antitrust enforcement been as active as in the health care industry. But the Eighth Circuit's summary disposition of this case reflects a judicial approach which resists application of the antitrust laws to health care markets, irrespective of its implication for consumers.[15]

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[14] (...continued)
towards the type of "refusals to deal" by physicians seen here. For example, consent orders restricting physician groups' refusals to deal have been obtained by the FTC in the following matters: 59 FR 4889 (In Re: Medical Staff of Good Samaritan Regional Medical Center, Proposed Consent Agreement); 53 FR 18273 (Medical Staff of Doctors' Hospital of Prince Georges County, Consent Order); 56 FR 28911 (Medical Staff of Broward General Medical Center, Proposed Consent Agreement); 50 FR 41693 (Health Care Management Corp., Proposed Consent Agreement).

[15] See, Comments of Kevin O'Connor, Chair, National Association of Attorney Generals Multi-state Antitrust Task Force, Antitrust Law Journal, Spring 1996 ("[S]tates have a vital interest in preventing the evisceration of the antitrust laws as applied to health care.")

CONCLUSION

For the reasons stated above, Dr. Read respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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